In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-195

SUN SHIPBUILDING & DRY DOCK COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, Sun Shipbuilding & Dry Dock Company, brought this action against the United States in the Court of Claims pursuant to 28 U.S.C. 1491, for an alleged breach of a standard government construction-differential subsidy contract. The Court of Claims granted summary judgment in favor of the United States on Count I of petitioner's complaint (Pet. App. A1-A3). A subsequent motion for rehearing was denied (Pet. App. A4). Count II is still pending in the Court of Claims.

1. The contract at issue was entered into in 1962 by the United States, acting through the Maritime Subsidy Board (the Board), Sun Shipbuilding & Dry Dock Company (petitioner) and United States Lines (USL), and provided that petitioner was to build five cargo vessels for USL and was to be paid by the Board and USL as the work progressed (Pet. App. A5, A7-A8).

In September 1969, petitioner and USL invoked the dispute settlement procedure provided by Article 36 of the contract (Pet. App. A25-A26) to determine the sum owed petitioner for changes in the ship specifications. Petitioner's claim was heard by the Board. On review, the Secretary of Commerce awarded petitioner $3,100,000.

USL refused to pay its portion of this award, asserting that the amount was excessive. The Board paid its portion of the award but refused to pay USL's part. Petitioner then brought this suit (pursuant to the Wunderlich Act, 41 U.S.C. 321) seeking, in Count I, to recover from the United States, as indemnitor, USL's share of the award, and, in Count II, to increase the amount of the award. The United States thereafter impleaded USL as a third party defendant and USL answered petitioner's complaint by seeking to reduce the amount of the award.

The Court of Claims granted summary judgment for the United States on Count I, holding that since USL's defense might result in a reduction of the amount of the Board's award, the award was not "finally determined" and the United States was thus not liable under the contract as indemnitor (Pet. App. A3, A24-A25, Art. 31). The Court of Claims has not yet ruled with respect to Count II (Pet. App. A3).

2. Petitioner contends that the Court of Claims erroneously held that USL was not in default. The plain language of the contract, however, demonstrates the correctness of the holding of the Court of Claims and the inappropriateness of review prior to final judgment. Article 31 (Pet. App. A24) makes the Board's obligation as indemnitor dependent upon default by the owner (USL) and characterizes default as the failure to make payments "provided to be made bythe Owner to the Contractor pursuant to the Special Provisions and the General Provisions of this Contract at the respective times provided for such payments." Article 4(e) of the contract's General Provisions (Pet. App. A16) provides, in relevant part, that:

> One hundred and ten per cent (110%) of the net increase in estimated cost, if any, resulting from all change cost estimates, *as approved or as finally determined,* shall be added to the contract price as an adjustment thereof. [Emphasis added.]

A default, therefore, can occur only after a change in cost has been either "approved" or "finally determined" and the owner has refused to pay. In the instant case there has been neither approval nor final determination. "Approval" clearly refers to changes in cost agreed upon by all parties. Here, the change in cost was disputed by USL. There has been no "final determination" of cost since both petitioner and USL are seeking Wunderlich Act review of the administrative award and Article 36 of the contract's General Provisions (Pet. App. A25-A26) expressly provides that a claim is not final until judicial review of the administrative decision is complete.

Petitioner additionally contends that the delay in payment necessitated by judicial review of the administrative decision "substantially confiscate[s]" his claim. Petitioner, however, voluntarily entered into the contract which provides for such review. Moreover, Congress, in the Wunderlich Act, *supra,* determined that whatever might be lost in terms of the expeditious settlement of contract disputes was outweighed by the desirability of permitting judicial review of Agency decisions.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.